Supreme Court, U.S.
FILED
APR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

REPLY BRIEF FOR PETITIONER

CLIVE A. STAFFORD SMITH
SOUTHERN PRISONERS' DEFENSE COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

FLOYD ABRAMS
LAURENCE T. SORKIN*
MARSHALL COX
ANTHONY PADUANO
CAHILL GORDON & REINDEL
(a partnership including professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner Samuel Bice Johnson

* *Counsel of Record*

April 16, 1988

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I MISSISSIPPI'S CONCESSION THAT IT WAS OBLIGED TO AFFORD FULL FAITH AND CREDIT TO THE NEW YORK COURT'S REVERSAL OF JOHNSON'S NEW YORK CONVICTION REQUIRES REVERSAL OF JOHNSON'S DEATH SENTENCE	1
II RESENTENCING IS NECESSARY WHEN A DEATH SENTENCE DEPENDS UPON AN INVALID PRIOR CONVICTION	4
III THERE IS NO VALID PROCEDURAL BAR TO THIS COURT'S REVIEW	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases PAGE

Baldwin v. *State*, 499 S.W.2d 7 (Tex. Crim. App. 1973) 5n

Barclay v. *Florida*, 463 U.S. 939 (1983)..... 4, 6

Burgett v. *Texas*, 389 U.S. 109 (1967)..... 5

Burrell v. *McMann*, 51 Misc. 2d 185, 273 N.Y.S.2d 9 (Sup. Ct. Clinton Co. 1966)..... 2n

City of Pendleton v. *Standerfer*, 297 Or. 725, 688 P.2d 68 (1984)..... 5n

Commonwealth v. *Barrett*, 3 Mass. App. 8, 322 N.E.2d 89 (1975)..... 5n

DeBussi v. *State*, 453 So. 2d 1030 (Miss. 1984)..... 9

Evans v. *State*, 485 So. 2d 276 (Miss.), *cert. denied*, 476 U.S. 1178 (1986)..... 8n

Ford v. *State*, 437 So. 2d 13 (Miss. 1983)..... 5n

Haislip v. *Morris*, 84 Wash. 2d 106, 524 P.2d 405 (1974) 5n

Hathorn v. *Lovorn*, 457 U.S. 255 (1982)..... 9

Lowenfield v. *Phelps*, 108 S. Ct. 546 (1988)..... 6

Milliken v. *Meyer*, 311 U.S. 457 (1940)..... 3n

Neuschafer v. *Whitley*, 816 F.2d 1390 (9th Cir. 1987) .. 5

Nixon v. *State*, No. DP-65 (Miss. Nov. 25, 1987)..... 9

Odom v. *State*, 483 So. 2d 343 (Miss. 1986)..... 8n

People v. *Buckley*, 44 Ill. App. 3d 1038, 358 N.E.2d 1327 (1977)..... 5n

People ex rel. Sloan v. *Lawes*, 255 N.Y. 112, 174 N.E. 80 (1930)..... 2n

PAGE

Phillips v. *State*, 421 So. 2d 476 (Miss. 1982).....7, 8, 8n, 9

Smith v. *Murray*, 106 S. Ct. 2661 (1986)..... 5

Smith v. *State*, 477 So. 2d 191 (Miss. 1985)..... 8n

State v. *Cummings*, 386 N.W.2d 468 (N.D. 1986)..... 5n

State v. *Dowd*, 478 A.2d 671 (Me. 1984)..... 5n

State v. *Edmison*, 379 N.W.2d 85 (Minn. 1985)..... 5n

State v. *Koch*, 118 N.J. Super. 421, 288 A.2d 295 (App. Div. 1972)..... 5n

Townsend v. *Burke*, 334 U.S. 736 (1948)..... 5, 5n

Underwriters National Assurance Co. v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691 (1982)..... 2n

United States v. *Tucker*, 404 U.S. 443 (1972)..... 5, 5n

Wainwright v. *Goode*, 464 U.S. 78 (1983)..... 6

Wilburn v. *State*, 253 Ark. 608, 487 S.W.2d 600 (1972) 5n

Zant v. *Stephens*, 462 U.S. 862 (1983)..... 6

Constitutional Provision

U.S. Const. A. . IV, § 1 .....*passim*

Statutes

Miss. Code Ann.
§ 99-19-101 (Supp. 1987)..... 4n
§§ 99-39-1 *et seq.* (Supp. 1987)..... 8n
§ 99-39-5(2) (Supp. 1987)..... 8n
§ 99-39-21 (Supp. 1987)..... 8n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-5468

SAMUEL BICE JOHNSON,

Petitioner,

—v.—

STATE OF MISSISSIPPI,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

REPLY BRIEF FOR PETITIONER

I.

MISSISSIPPI'S CONCESSION THAT IT WAS OBLIGED TO AFFORD FULL FAITH AND CREDIT TO THE NEW YORK COURT'S REVERSAL OF JOHNSON'S NEW YORK CONVICTION REQUIRES REVERSAL OF JOHNSON'S DEATH SENTENCE

Mississippi now concedes that the Mississippi Supreme Court was obliged to give full faith and credit to the March 24, 1987 judgment of the New York Court of Appeals reversing Johnson's 1963 New York conviction for second degree assault (Miss. Br. 11-18). In an effort to avoid the certain effect of this

concession,[1] the state offers a half-hearted and wholly perverse misreading of the opinion of the Mississippi Supreme Court, concluding that the court "clearly did" give effect to that judgment (Miss. Br. 12). In truth, the Mississippi majority could not have been plainer in its refusal to accord full faith and credit to the New York Court of Appeals decision vacating Johnson's 1963 conviction. For example, the Mississippi majority said:

- "We . . . hold that a foreign state cannot vitiate the death penalty verdict in this case by setting aside a prior conviction of a violent crime through a collateral relief petition [filed in the foreign state]." 511 So. 2d at 1338 (JA. 105).

And:

- "If we adopted Johnson's argument, the state could never use [an out-of-state] conviction as an aggravating circumstance, because of the extreme likelihood that a foreign state could overturn the prior conviction through collateral attack." 511 So. 2d at 1338 (JA. 105).[2]

And:

- "No death penalty verdict based upon this [1963 New York] conviction need be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals." 511 So. 2d at 1339 (JA. 106).

---

1 Under New York law, reversal of the 1963 conviction rendered that conviction a nullity and all prior proceedings void *ab initio*. *People ex rel. Sloan* v. *Lawes*, 255 N.Y. 112, 117, 174 N.E. 80, 81 (1930); *Burrell* v. *McMann*, 51 Misc. 2d 185, 188, 273 N.Y.S.2d 9, 12 (Sup. Ct. Clinton Co. 1966). It must therefore be treated as void for all purposes in Mississippi as well, if the command of the Full Faith and Credit Clause (U.S. Const. Art. IV, § 1) applies and requires Mississippi to give " 'the same credit, validity, and effect' " to the New York judgment as would " 'the state where it was pronounced.' " *Underwriters National Assurance Co.* v. *North Carolina Life & Accident & Health Insurance Guaranty Ass'n*, 455 U.S. 691, 704 (1982).

2 The xenophobic concern that states would choose to subvert their own legal processes to assure that Mississippi could not proceed with its own is offered by the Mississippi Supreme Court without the slightest support.

There is no way in which these openly defiant statements can be reconciled with the Constitution's requirement of full faith and credit.[3] The dissenters below understood as much when they pointed out that the majority had given "less than full faith and credit" to the New York decision (JA. 117). The Mississippi ruling, misapprehending New York law and misdescribing the proceedings in New York, was forthright in stating that it would not recognize the 1987 New York reversal. In language that is not in the slightest ambiguous, the Mississippi majority doubted that "the post-conviction relief proceedings in the New York courts were truly adversarial," surmised that the New York decision was motivated entirely by a desire to "vitiate the death penalty verdict" in Mississippi, and assumed that the New York prosecutor—and presumably the New York courts—had no interest in upholding Johnson's 1963 conviction. 511 So. 2d at 1338 (JA. 105). That these statements are false—as they are[4]—is not the crux of the matter. Rather, the Full Faith and Credit Clause simply forbade Mississippi to question the motive, purpose or wisdom of the New York Court of Appeals in reversing Johnson's New York conviction.

Apparently well aware that its attempted reading of the Mississippi Supreme Court ruling is facially at odds with the ruling itself, Mississippi devotes more than 30 pages of its brief to arguing that putting Johnson's now-reversed 1963 New York conviction before the jury which sentenced him to death was harmless error because the failure of one aggravating circumstance does not require resentencing in a capital case when there are other valid aggravating circumstances. This argument is

---

3 Mississippi's brief acknowledges that "the Mississippi Supreme [Court] questioned the reasoning behind and the actual procedures used in vacating the New York conviction . . ." (Miss. Br. 38). *Compare Milliken* v. *Meyer*, 311 U.S. 457, 462 (1940) ("the full faith and credit clause of the Constitution precludes any inquiry into the merits of the cause of action, the logic or consistency of the decision, or validity of the legal principles on which the judgment is based. . . . Whatever mistakes of law may underlie the judgment . . ., it is 'conclusive as to all the *media concludendi*.' ") (citations omitted).

4 *See* Brief of the Attorney General of the New York State as *Amicus Curiae* at 10-14.

foreclosed by the holding of the Mississippi Supreme Court itself that the sentencing jury's consideration of the invalid 1963 conviction could not be considered harmless. The majority ruled flatly that "[w]e eschew 'harmless error' in our reasoning . . . because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty." 511 So. 2d at 1338 (JA. 104).[5]

That determination by the court most familiar with the administration of Mississippi's death-penalty law and the temper of its juries should conclude the matter. *See Barclay v. Florida*, 463 U.S. 939, 954-56 (1983) (plurality opinion) (Rehnquist, J.).

II.

RESENTENCING IS NECESSARY WHEN A DEATH SENTENCE DEPENDS UPON AN INVALID PRIOR CONVICTION

Mississippi's brief completely avoids the second issue presented here: whether—entirely aside from the Mississippi Supreme Court's concession that the sentencing jury's consideration of Johnson's 1963 conviction could not be harmless error—a death sentence can stand when the principal aggravating circumstance is supported only by evidence of a subsequently vacated prior conviction. Mississippi argues instead that no matter what invalid aggravating circumstances are weighed by a sentencing jury in a capital case and no matter

5 The decision to eschew harmless error was a unanimous determination by the Mississippi Supreme Court, one in which the six-person majority was joined by the three dissenting justices. 511 So. 2d at 1345 (JA. 118). Both the majority and the dissenters rested their decision on the prosecutor's having argued at sentencing that the prior conviction was the principal aggravating circumstance warranting death. 511 So. 2d at 1338 & 1342 (JA. 104; 114). The jury that sentenced Johnson to death was instructed, consistent with Mississippi law, Miss. Code Ann. § 99-19-101 (Supp. 1987), to return a death sentence only if it found "that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances." (JA. 13-15; 17).

how prejudicial the evidence introduced to support a failed aggravating circumstance, resentencing is never required so long as at least one aggravating circumstance relied on by the jury is ultimately found to be valid (Miss. Br. 18-45).

The state's argument ignores altogether this Court's decisions in *Burgett* v. *Texas*, 389 U.S. 109 (1967), prohibiting the admission of a constitutionally infirm conviction to enhance punishment, and in *Townsend* v. *Burke*, 334 U.S. 736 (1948) and *United States* v. *Tucker*, 404 U.S. 443 (1972), holding that a sentence must be set aside when based on an invalid prior conviction or "misinformation of constitutional magnitude."[6] Those cases clearly compel the result reached by the four members of this Court who have considered the question: the introduction of "evidence that in itself represents an independent constitutional violation . . . quite clearly undermines the validity of the capital sentencing proceeding and violates the Eighth Amendment." *Smith* v. *Murray*, 106 S. Ct. 2661, 2677 (1986) (Stevens, J., dissenting). *Compare Neuschafer* v. *Whitley*, 816 F.2d 1390, 1393 (9th Cir. 1987) (Kennedy, J.) (upholding death sentence where there was no evidence that "should not have been brought to the jury's attention in the sentencing phase").

6 State courts routinely apply the *Tucker-Townsend* rule to require resentencing where a sentence depended upon an invalid prior conviction. *See, e.g.*, *Wilburn* v. *State*, 253 Ark. 608, 487 S.W.2d 600 (1972); *People* v. *Buckley*, 44 Ill. App. 3d 1038, 358 N.E.2d 1327 (1977); *State* v. *Dowd*, 478 A.2d 671 (Me. 1984); *Commonwealth* v. *Barrett*, 3 Mass. App. 8, 322 N.E.2d 89 (1975); *State* v. *Edmison*, 379 N.W.2d 85 (Minn. 1985); *State* v. *Koch*, 118 N.J. Super. 421, 288 A.2d 295 (App. Div. 1972); *State* v. *Cummings*, 386 N.W.2d 468 (N.D. 1986); *City of Pendleton* v. *Standerfer*, 297 Or. 725, 688 P.2d 68 (1984); *Baldwin* v. *State*, 499 S.W.2d 7 (Tex. Crim. App. 1973); *Haislip* v. *Morris*, 84 Wash. 2d 106, 524 P.2d 405 (1974) (*en banc*). Holdings to the same effect by the United States courts of appeals are cited at page 23 n.17 of petitioner's opening brief.

The Mississippi Supreme Court has itself acknowledged that *Townsend* "controls" in cases where "the foundation for the sentence . . . consist[s] of materially false information." *Ford* v. *State*, 437 So. 2d 13, 14 (Miss. 1983) (remanding for resentencing where 20-year manslaughter sentence was "improperly based on prejudicial and unvalidated information" relied on by sentencing judge).

Mississippi's position is based upon a misreading of *Lowenfield* v. *Phelps*, 108 S. Ct. 546 (1988). *Lowenfield* involved a death sentence based on an aggravating circumstance that duplicated an element of the offense of capital murder. The aggravating circumstance was not claimed to be invalid and was not the vehicle for introducing prejudicial evidence that was not otherwise admissible. 108 S.Ct. at 554-55.

Nor do any of the other cases relied on by Mississippi support its position. In *Zant* v. *Stephens*, 462 U.S. 862 (1983), this Court dealt with the effect under the Georgia statute of a subsequent determination that one of several statutory aggravating circumstances found by a jury was invalid because of unconstitutional vagueness. The error there was what this Court characterized as the " 'mere fact that some of the [admissible evidence was] . . . improperly designated "statutory." ' " 462 U.S. at 889 (citation omitted). The Georgia Supreme Court held the error harmless, and this Court agreed. 462 U.S. at 891. Here, however, the Mississippi Supreme Court has explicitly acknowledged that the jury's consideration of Johnson's invalid New York conviction at sentencing was *not* harmless error. *Barclay* v. *Florida*, 463 U.S. 939 (1983) (plurality opinion) (Rehnquist, J.), and *Wainwright* v. *Goode*, 464 U.S. 78 (1983) (*per curiam*), also involved harmless-error findings in cases where no unconstitutional or otherwise inadmissible evidence entered into the sentencing process. Just the opposite is true here.[7]

Samuel Johnson's death sentence was based upon the Mississippi prosecutor's repeated hammering on a 1963 New York conviction that was obtained in violation of Johnson's constitutional rights in circumstances in which the actions of New York itself made any reliable determination of guilt impossible. That conviction is now a nullity. No one should be put to death on the basis of such evidence.

---

7 Without exception, the lower court cases relied on by Mississippi (Miss. Br. 42-44) do not involve the introduction of inadmissible evidence to establish an invalid aggravating circumstance and do not address the issue of whether a death sentence can stand on the basis of such evidence.

III.

THERE IS NO VALID PROCEDURAL BAR TO THIS COURT'S REVIEW

Mississippi's brief acknowledges that the state has not previously argued that Johnson's rights are procedurally barred (Miss. Br. 48). The Mississippi Supreme Court raised the procedural bar *sua sponte* in its May 27, 1987 decision denying post-conviction relief. It said that Johnson's claim was barred because he had not challenged the validity of the 1963 New York conviction on direct appeal in 1984 or in his 1985 petition for *certiorari* following affirmance of his Mississippi conviction. The Mississippi Supreme Court did not even suggest—as is now argued by the state (Miss. Br. 53-55)—that Johnson's claim was barred because he did not object to the validity of the 1963 conviction at his 1982 trial or because he waited until 1986 to challenge that conviction in New York.

Johnson's opening brief showed that his claim cannot be procedurally barred because under *Phillips* v. *State*, 421 So. 2d 476 (Miss. 1982), a challenge to an out-of-state predicate conviction used to enhance a criminal sentence in Mississippi *must* first be successfully mounted in the state where it was entered before any relief can be had in Mississippi. In apparent recognition that the procedural bar relied on by the Mississippi Supreme Court provides no legitimate basis for depriving Johnson of relief, Mississippi has shifted ground to advance a procedural bar argument wholly different from that relied on below. Mississippi now argues that Johnson "did not, in any timely fashion, attempt to have the New York conviction overturned" and "waited for more than two years before instigating any post-conviction proceedings in New York" (Miss. Br. 55). That new contention is no more plausible than the abandoned theory it would replace.

- Mississippi cites no case or statute that could have put counsel on notice in 1982 when Johnson was tried that any challenge to the 1963 New York conviction would be time-

barred under Mississippi law unless brought within a specified period of time.[8]

• Mississippi argues that a bar did exist at the time of petitioner's direct appeal—one requiring a defendant to raise all claims arising at his trial on direct appeal—but ignores the fact that because petitioner was not required or even permitted to raise the issue now in question at his trial there was nothing to be raised on direct appeal.[9]

• Like the court below, Mississippi ignores the dictate of *Phillips* itself that challenges to a predicate conviction must be made collaterally, not at trial or on direct appeal. Defendant must first bring a proceeding "in the state in which such conviction occurred, pursuant to that state's established procedures. Should such proceeding in the foreign state succeed in overturning the conviction, then relief

8 The opinion in *Evans* v. *State*, 485 So. 2d 276 (Miss.), *cert. denied*, 476 U.S. 1178 (1986), underlines how baseless Mississippi's reliance on that decision is. Mississippi in its brief here (Miss. Br. 49-50) fails to note that Miss. Code Ann. § 99-39-21 (Supp. 1987), relied on in *Evans*, was not in effect at the time of Johnson's trial or the filing of his direct appeal, and has been held not to apply retroactively. *See, e.g., Smith* v. *State*, 477 So. 2d 191 (Miss. 1985); *cf. Odom* v. *State*, 483 So. 2d 343 (Miss. 1986). Moreover, *Phillips* squarely establishes that the validity of a prior out-of-state conviction is *not* an issue capable of determination at trial or on direct appeal in Mississippi.

9 Miss. Code Ann. § 99-39-5(2) (Supp. 1987) provides that a motion for relief under Mississippi's Uniform Post-Conviction Collateral Relief Act, Miss. Code Ann §§ 99-39-1 *et seq.* (Supp. 1987), shall be brought "within three (3) years after the time in which the prisoner's direct appeal is ruled upon by the supreme court of Mississippi," except for certain cases in which the motion can be filed even later. Johnson's conviction was affirmed by the Mississippi Supreme Court on May 8, 1985, and his motion under the Uniform Post-Conviction Collateral Relief Act was filed on August 4, 1986, only 15 months later and after he had unsuccessfully petitioned this Court for a writ of *certiorari*. The Uniform Act was, in any event, approved by the Mississippi Legislature on April 17, 1984. Mississippi wrongly asserts that the bar was in place at the time the direct appeal was filed on February 14, 1984.

should be sought in Mississippi by petition for writ of error *coram nobis.*" 421 So. 2d at 482.

That Mississippi now goes so far as to contend that the *Phillips* rule does not even apply to this capital case (Miss. Br. 51-55) illustrates all too well the only neutral principle the state seeks to apply here: this defendant must be executed, however well-founded his reliance on previously established Mississippi law. For not only has the Mississippi Supreme Court previously held that Mississippi's "habitual offender sentencing procedure resembles in all relevant respects the sentencing phase of capital crimes," *DeBussi* v. *State*, 453 So. 2d 1030, 1032 (Miss. 1984), but that court—accepting the Mississippi Attorney General's express argument—has relied upon *Phillips* to deny relief in a capital case decided *after* the decision below. *Nixon* v. *State*, ____ So. 2d ____, No. DP-65 (Miss. Nov. 25, 1987) (*en banc*). *See also* Brief of the Mississippi Public Defenders' Association as *Amicus Curiae* at 14-16. Mississippi's efforts to interpret *Phillips* in flatly inconsistent fashion in two cases in order to assure the execution of the defendant in each adds a grisly twist to the concept that "death is different." *See Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982) (only if Mississippi "consistently relies upon . . . [a procedural bar] rule" will federal courts be denied review of constitutional claims).

In any event, neither the procedural bar rule urged by Mississippi in this Court nor the different procedural bar rule relied on by the Mississippi Supreme Court below even purports to serve a legitimate state interest. *Phillips* directs the trial courts of Mississippi not to hear evidence about the validity of an out-of-state conviction. *Accord Nixon v. State*, ____ So. 2d at ____. Without a trial record, the Mississippi Supreme Court would have nothing to decide on any direct appeal.[10] The only

10 As the Mississippi dissenters observed below:

"Johnson had no basis for the claim he asserts until he obtained the [New York Court of Appeals] order of March [24], 1987, vacating his 1963 New York conviction. Had he raised the point prior to March 24, 1987, we would no doubt have dismissed it out of hand and, consistent with the temper of the time, would probably now hold the claim barred by res judicata." 511 So. 2d at 1343 (JA. 115).

purpose of the array of after-created procedural bars doggedly interposed by Mississippi here is to prevent the consideration of Johnson's federal constitutional rights.

CONCLUSION

The judgment of the Mississippi Supreme Court should be reversed and petitioner's death sentence should be vacated.

Dated: New York, New York
April 16, 1988

Respectfully submitted,

CLIVE A. STAFFORD SMITH
SOUTHERN PRISONERS'
DEFENSE COMMITTEE
185 Walton Street, N.W.
Atlanta, Georgia 30303
(404) 688-1202

FLOYD ABRAMS
LAURENCE T. SORKIN*
MARSHALL COX
ANTHONY PADUANO
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioner
Samuel Bice Johnson

**Counsel of Record*